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LAW, GOVERNANCE AND DEVELOPMENT: A CASE STUDY OF WOMEN'S SOCIAL MOBILISATION AND TRANSITIONAL JUSTICE



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Executive Summary

This briefing note addresses the connections between law and governance in post-conflict states, with a particular emphasis on how law connects with social mobilisation to transform governance institutions in societies emerging from conflict or authoritarianism. Using women's social mobilisation around transitional justice processes (all of which have a specific focus on reform of governance institutions) as a case study, the briefing note illustrates the ways in which international legal norms relating to good government and participation are used by domestic interveners in political settlements, and sets out the factors significant to successful intervention.

Introduction: Political Settlements and Transitional Justice

Transitional justice is a burgeoning field of scholarship and practice, dedicated to advancing accountability for widespread human rights violations in the aftermath of violent conflict or repressive rule (see generally UN Secretary-General 2004, 2011). Although initially conceptualised in relatively narrow terms, pertaining the prosecution of elite leadership figures (see, e.g., Orentlicher, 1991), contemporary transitional justice is understood as broadly linked to issues of peacebuilding (e.g. Laplante, 2008), development (de Greiff and Duthie, 2009) and establishing the rule of law (see especially UN Secretary-General, 2011). Feminist interventions into transitional justice have focused most concerted on two questions: firstly, on the understanding of violence, harm, and human rights violations to redressed through transitional justice (see generally Bell and O'Rourke, 2007) and, secondly, on challenging the vision of peacebuilding, development and rule of law to which transitional justice activities are designed to support (e.g. Ni Aolain, et al, 2011).

Work on theorising the intersection of the rule of law and political settlements is relatively sparse, thereby suggesting limited engagement to date between political settlements scholarship and transitional justice. Nevertheless, the work that does exist points to some valuable lines of inquiry for considering the gendered outcomes of transitional justice in particular country-settings in terms of political settlements (see especially Desai and Woolcock, 2012). Indeed, Bell advances a valuable understanding of transitions and political settlements in terms of achieving the rule of law: 'the transition from authoritarian exclusive political settlements to more inclusive forms of government characterised by the rule of law' (Bell, 2015: 18). Further, the over-arching question posed by Desai and Woolcock (2012) on



political settlements and the rule of law has ready resonance for considering gender and transitional justice:

How do political settlements – that is, processes of intra-elite bargaining – shape the justice systems and the access available to poor and marginalised groups? How can elite-led agreements on the rule of law develop into more inclusive agreements that benefit poor and marginal groups, particularly women? (Desai and Woolcock, 2012: 3)

Demands by women's movements on post-conflict and post-authoritarian regimes to deliver accountability for the old regime's harms against women is therefore a valuable case study through which to consider the resonance of the political settlement theoretical framework to transitional justice.

In my comparative study of gendered outcomes of transitional justice processes, *Gender Politics in Transitional Justice* (Routledge, 2013), I focused on the role and efficacy of women's civil society organisations in seeking post-conflict and post-authoritarian accountability for harms against women. In selecting the case studies, the convergence of domestically-driven transitions was highly-important, in which intra-elite bargaining exclusively involved domestic actors.

The factors I ultimately identified as critical to the success (or otherwise) of women's civil society interventions into transitional justice processes were:

(a) The relationship between the human rights movement and the women's movement during the period of authoritarian exclusive political settlements.¹ Where these relationships were positive, there was enhanced documentation of women's experiences of harm, with direct implications on the harms prioritised for accountability in transitional justice processes the ultimately unfolded. This is a particularly useful insight for thinking about how bargaining between non-elites can influence political settlements (cf. Putzen and DiJohn, 2012).

(b) Framing, the extent to which women's movement demands resonate with the over-arching political narrative of transition (O'Rourke, 2013: 34-36). Where women's movement demands allied with (even rhetorical) commitments to human rights and equality of elites, there were enhanced opportunities for women's movement to influence ultimate political settlements. This is also a valuable insight for understanding gender and political settlements more broadly, in terms of devising strategies for non-elites to influence intra-elite bargaining around gender equity norms (see generally Nazneen and Mahmud, 2012: 3).

(c) The openness of domestic political settlements to progressive accountability requirements of international law (discussed further below).

The remainder of this short briefing note will focus the finding (c), regarding the potential and actual role of international law in shaping domestic transitional justice process.

1 In the book, this argument and analysis is developed in Chapter 3 Defining 'Justice': Patterns in Human Rights Advocacy and Chapter 4. Criminal accountability and harms against women, (O'Rourke, 2013: 61-98).

Understanding the Relationship of International Law and the Gender Outcomes of Domestic Transitional Justice Political Settlements

Gender Politics in Transitional Justice developed the following framework for understanding the distinct, though related, ways in which international law can matter to human rights outcomes for women engaged in domestic processes of transitional justice. This framework has three components: legal, normative and political.

1. Legally: Transitions constitute ruptures to the domestic legal order, as they typically involve substantial revision to domestic laws and constitutions. In this period of substantial domestic flux, international law offers a consistent and continuous frame for the domestic legal order (Teitel, 2000: 20). In providing this continuity, international law preserves the rule of law in the transitional state. In transitional justice design, local decisions around accountability are made with reference to international law. A legal obligation upon transitioning states to prosecute those who bear greatest responsibility for – at a minimum – genocide, crimes against humanity and war crimes, mean that domestic compromises around accountability in transitional states operate in the shadow of international law. Recognizing this central role of international law in transitions, feminist legal analysis has been principally concerned with the evolving definition of harms against women under international law, and securing legal recognition of rape as a war crime, crime against humanity and a constitutive act of genocide.

International law can guide domestic legislation on related matters of transition and transitional accountability. For example, the famous Pinochet arrest in London and subsequent legal proceedings through the UK courts hinged on section 134 of the domestic statute, the Criminal Justice Act 1988, which incorporated the Convention Against Torture into UK law, and thereby created a new crime under UK law, the crime of torture. Further, there are manifold incidents in which domestic courts deliver positive accountability outcomes through the application of international human rights treaty law to domestic cases. Such examples pertain across domestic litigation initiatives to deliver criminal accountability for past crimes and to vindicate the positive duty on states to prevent discrimination against women in the response of criminal justice institutions to sexual violence.

2. Normatively: In line with the discussion of the potential legal significance of international norms for gender equality on domestic political settlements, within transitional justice scholarship and practice, it is accepted that, in societies emerging from widespread human rights violations, domestic law can be widely-perceived to be corrupt, biased, deficient or ineffective (see, e.g. Teitel, 2000; Campbell and Ni Aolain, 2005). International law can therefore play a particularly pronounced role in filling this legal and normative vacuum, given the need for a domestic gap in law to be filled and international law's perceived distance from problematic law of domestic elites. Teitel (2000: 21) observes: "Positive international law norms are defined in conventions, treaties, and customs. Moreover, in its circumspection of the most heinous abuses, international law offers a source of normative transcendence'. Particularly important from the perspective of securing open and inclusive political settlements, we have witnessed substantial progressive change in international legal norms for gender equality, in the protection of women's rights (for example, the entry into force of the Optional Protocol to the Convention on the Elimination of All Forms of Violence Against Women), women's participation rights (in particular, in the Women, Peace and Security Resolutions of the United Nations Security Council), and in the heightened criminal accountability under international law for harms perpetrated against women (see generally,). In each of these respects, international law stands to have a potentially positive normative impact on the shape of transitional

justice in domestic states. The criminalization under international law of individual acts of gender-based violence can set an important marker for the post-conflict and post-authoritarian society of the moral repugnance of these offences. It can shine a light on the structural gender inequalities that enable such offences. Within the legal understanding of the harm under international law lies the potential to progressively reshape the social understanding of the harm in the domestic transitional context.

3. Politically: The potential political impact of international law on domestic processes of transitional justice is two-fold: firstly, international law can be valuable in affirming women's political equality by, for example, supporting the presence of women in transitional justice processes, and secondly, international law can play an important role in the strategies adopted by women's movements in their engagement with domestic processes of transitional justice. In terms of the impact of international law on the strategies of women's movements more generally, the findings of Beth Simmons' (2009) definitive empirical research on the domestic impact of international human rights treaties are highly relevant. The study demonstrates that domestic impact does not turn on interstate relations or peer enforcement by states of the human rights regime. Rather, it was concluded, that it is in the empowerment of domestic actors to mobilize successfully to secure domestic implementation that international treaties hold their significance. The Simmons study points in particular to the effectiveness of this strategy with respect to the Convention Against Torture and the Convention on the Elimination of all Forms of Discrimination Against Women, two treaties with the greatest potential significance for the human rights outcomes for women of transitional justice. The 'consistently important role [international human rights treaty law and related mobilization] has played in polities in which institutions are changing, evolving, and in flux' is noted (Simmons, 2009: 360). Moreover, the Simmons study concludes, the supportive international legal framework can promote and reinforce the legitimacy of the domestic demands of women's movements (Simmons, 2009: 357).

In the specific case of repressive or authoritarian states, transnational coordination between local civil society and with civil society in other states to push international institutions to pressure for improved human rights performance of recalcitrant governments has been found to be critical to the effectiveness of domestic civil society mobilization (Keck & Sikkink, 1998). Transnational coordination by women's movements to enhance the rights of women to live free from violence has been identified as a particularly salient and effective case (Keck & Sikkink, 1998: 165-198). Whether or not local women's movements could look to neighbouring women's movements and a transnational feminist network to support their claims was, in part at least, dependant on a supportive international legal framework to facilitate such coordination. Further, this transnational coordination is critical in fostering peer enforcement by states of international human rights obligations. In the early 1990s, for example, human rights networks cooperated to pressurize US and European states to impose human rights reforms on non-compliant states of Central America by de-funding repressive military governments of El Salvador and Guatemala (Burgerman, 1998).

Project Next Steps: Understanding how international norms for gender equality influence political settlements more broadly

Under the DFID-funded Political Settlements Research Programme (PSRP), the author is examining more broadly how international legal norms for gender equality are understood to influence

domestic political settlements (Project 4.3: Gender Norms and Political Settlements).² This will be achieved through improved understanding of how women's civil society activism makes use of international legal norms on the ground in conflict-affected and post-conflict states in order to advance gender-inclusive peacebuilding.

International legal norms for gender equality and gender parity in participation are both symbolic and material means by which international actors intervene into local conflict resolution and peacebuilding. These standards are proliferating in respect of women's human rights (e.g. CEDAW General Recommendation No. 30, 2014), women's participation rights (e.g. UNSCR 1325 (2000) and 2122 (2014)), and in ending impunity for particular forms of gender-based violence in conflict (International Protocol, 2013). We are clearly witnessing, therefore, a busy and extended period of international norm development for gender equality in conflict-affected and post-conflict settings, initiated by the Security Council's adoption of Resolution 1325 (2000) on Women, Peace and Security (WPS). Contemporary developments suggest not only ongoing work in generation of international legal norms (most recently, the adoption of UNSCR 2144 (2015)), but also concerted activity to reflect on and evaluate the efficacy of these international legal developments. This year has seen publication by the UN of three high-level reviews, dealing respectively with UN peacekeeping operations (2015), the UN's peacebuilding architecture (2015) and, most pertinent to this project, the Global Study on the Implementation of UNSCR 1325 (2015).

What this reflection and evaluation – focused on the activities of the UN system and state parties – is missing, however, is a considered understanding of how these international legal norms provide legal, normative and political mobilizing frameworks for women's civil society on the ground in conflict-affected and post-conflict states. Negative findings of the UN's Global Study on 1325 will likely feed into broader concerns about the efficacy of feminist strategy in international law (what Bell (2015: 9) has called 'the era of disillusionment'). Evidence nevertheless consistently points to energy by women's organisations in local³ and transnational⁴ settings, and to feminists within international institutions,⁵ continuing to work proactively for the development and enforcement of such norms. Not enough is known about the domestic prerequisites for international legal norms to play a supportive role for local women's civil society in the negotiation of gender inclusive peacebuilding, and how gender equality advocates within transnational non-governmental and intergovernmental institutions may usefully support the energies of local women's civil society to that end.

In terms of political settlements, Bell (2015: 15) has noted that:

Non-elite internal actors also often have their own investment in norms and normative arguments. They must often rely on arguments as to what 'is right and good', to try to gain entry to formal and informal sites of power, and have few other tools at their disposal. Internal actors often appeal to norms to exert traction on power-bargaining dynamics (see O'Rourke 2013). International legal standards have also invested heavily in under-writing the normative claims of 'the excluded' to inclusion, by requiring particular forms of inclusion in political bargaining processes such as peace processes, and particular substantive normative

2 See further <http://www.politicalsettlements.org/portfolio/gender-norms/>.

3 For example, the Northern Ireland Women's European Platform, WEACT 1325 in Philippines-Mindanao, Corporación Humanas in Colombia, Action Kivu in the Democratic Republic of the Congo.

4 For example, Women's International League for Peace and Freedom and Women's Initiatives for Gender Justice.

5 For example, gender policy experts within UN Women, the CEDAW Committee and Secretariat, the International Criminal Court Office of the Prosecutor and Trust Fund for Victims.

outcomes, such as accountability or equality, which if taken seriously, impact on when and how elite military-political actors access power in any new dispensation (Bell 2008).

This project will address a gap in understanding about the connections between developments in international legal norms for gender equality and their operation in the pursuit of gender-inclusive peacebuilding at the domestic level in conflict-affected and post-conflict states, in particular in supporting local women's civil society activity.

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